Supreme Court, U.S.
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No. 86-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNIVERSAL CITY STUDIOS, INC.,

Petitioner,

—against—

NINTENDO CO., LTD. AND NINTENDO OF AMERICA, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Of Counsel:

LAURENCE H. TRIBE
1525 Massachusetts Avenue
Griswold Hall, 307
Cambridge, Massachusetts 02138
(617) 495-1767

J. THOMAS MCCARTHY
University of San Francisco
Law School
2130 Fulton Street
San Francisco, California 94117
(415) 666-6517

MICHAEL W. SCHWARTZ*
WACHTELL, LIPTON, ROSEN
& KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Petitioner
Universal City Studios, Inc.

*Counsel of Record

20 pp

TABLE OF AUTHORITIES

CASES: PAGE

Board of Education v. *Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975) 8n

City of Riverside v. *Rivera*, ____ U.S. ____, 106 S. Ct. 2686 (1986) 7

Curiano v. *Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1984) .....6, 7-8&n

Eastway Construction Corp. v. *City of New York*, 762 F.2d 243 (2d Cir. 1985) 5

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) 7-8

Guard-Life Corp. v. *S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980) 8n

Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U.S. 251 (1916) 4n

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 3

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 1, 7

International Olympic Committee v. *San Francisco Arts & Athletics*, 781 F.2d 733, *amended on other grounds*, 789 F.2d 1319 (9th Cir.), *cert. granted sub nom. San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 55 U.S.L.W. 3277 (Oct. 20, 1986) 7n

Nemeroff v. *Abelson*, 620 F.2d 339 (2d Cir. 1980) 5, 6n

Noxell Corp. v. *Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521 (D.C. Cir.), *rehearing en banc denied*, 774 F.2d 1180 (1985) ..... 5&n

PAGE

Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air*, ___ U.S. ___, 106 S. Ct. 3088, *restored to argument docket*, 106 S. Ct. 3331 (1986) 7

Tedeschi v. *Smith Barney, Harris Upham & Co.*, 579 F. Supp. 657 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied*, 106 S. Ct. 147 (1985) 5

United States v. *Standard Oil of California*, 603 F.2d 100 (9th Cir. 1979) 5

Walker v. *Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961) 6

STATUTES AND RULES:

Lanham Act

Section 35, 15 U.S.C. § 1117 ..... *passim*

Section 45, 15 U.S.C. § 1127 ..... 4n

Rule 11, Federal Rules of Civil Procedure ..... 5-6&n

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Nintendo's brief opposing certiorari attempts to side-step Universal's reasons for seeking the writ. Nintendo concedes that the lower courts imposed unprecedented litigation sanctions without first determining that Universal's legal positions were legally frivolous or unfounded. Nintendo Br. 2, 4, 9-10; Universal Petition 15, 16-17, 18-21, 23-24. Nintendo simply ignores that there was substantial legal authority supporting Universal's positions, and that the Second Circuit condemned Universal for asserting legal positions with which the District Court had specifically *agreed*. Petition 5-9 & nn.3-5, 7-9, 16-18, 20.

Nintendo cannot deny that in disregard of *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), neither court below affirmatively determined that the fee award was reasonable, as expressly required by the Lanham Act. Nintendo cannot dispute that the

Second Circuit, although dealing with issues governed by New York law, failed even to cite a recent, apparently controlling ruling of New York's highest court, relying instead on dictum in one of its own interpretations of New York law and in an earlier New York case. *See generally* Universal Petition 15-16, 17-18, 21-22, 24-26.

Moreover, Nintendo nowhere tries to dispute Universal's demonstration that the decisions below flash a giant green light to all prevailing defendants, encouraging "sanctions" applications on a much larger scale than at present. Universal Petition 2-4, 23-24. Nintendo must recognize, as Universal's petition sets forth, that "sanctions" litigation has already become a growth industry in the federal courts; and therefore that a decision like the present one, which portends a still further increase, must be a matter of substantial concern to this Court.

Notwithstanding all this, Nintendo opposes certiorari on the basis that this case is a "most inappropriate context" to consider the sanctions issues Universal has raised, because the case is "fact-bound" and "replete" with findings of "subjective bad faith." Nintendo Br. 2, 4-9, 12. Nintendo also asserts that, apart from Section 35 of the Lanham Act, on which the Second Circuit relied in affirming the attorney's fee award, the award can be sustained on two "alternative grounds." *Id.* at 2-4, 13-14. These assertions, and Nintendo's other attempts to preclude this Court's review of the extraordinary decision below, are absolutely without merit.

First: Nintendo's claim that the lower courts' findings of bad faith make review by this Court inappropriate is completely unsound. It is precisely Universal's point that there cannot be "bad faith" in any sense relevant here unless and until it is determined that a litigant's legal positions, as an objective matter, were unfounded or frivolous. Nintendo concedes that no such determination was made. Nintendo Br. 2, 4, 9-10.

Nintendo claims that sanctions were nonetheless appropriate because "something far worse" than lack of objective legal

merit was found: that, *subjectively*, Universal "knew" it had no rights. Nintendo Br. 2, 5. Nintendo's position is both illogical and unsound. Where legal rights are concerned, one cannot logically be said to "know" whether they exist unless, objectively, the law is "clearly established" so that "a reasonable person would have known" it. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Moreover, Nintendo's "subjective bad faith" standard, because it does not require a determination of meritlessness, would permit the sanctioning even of claims having arguable legal merit—and would do so based on the outcome of a complex, costly fact-finding process. Indeed, that is precisely what happened here. Far from reducing burdens on the courts—which should be the basic purpose of litigation sanctions—Nintendo's subjective bad faith standard would needlessly add to them. Compare *Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at 815-17.

This is *not* a case where Universal was found to have *litigated* in "bad faith"—*e.g.*, by obstructing discovery, making frivolous motions, failing to litigate expeditiously or the like. The *sole* misconduct of which Universal was supposedly guilty was to assert a "bad faith" legal position. A9-11. Universal submits that a proper finding of "bad faith" in this sense necessarily required a careful analysis of the legal basis for the positions taken, justifying the conclusion that, as an objective matter, they had no such basis.[1]

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1 Such an objective standard has the additional virtue of not requiring an extensive factual record—much less the week-long "sanctions" trial which occurred here. Moreover, as this case graphically demonstrates, failure to make a threshold determination about objective legal merit makes the fact-finding process itself standardless. Thus, the "factual record" of "bad faith" to which Nintendo keeps referring consisted principally of evidence that Universal's retired general counsel recognized that RKO and Dino De Laurentiis Corp. had copyright rights in their "King Kong" movies. Nintendo argued that this recognition meant that Universal "knew" it had no trademark rights in King Kong, although that issue had never been adjudicated. The lower courts' failure to analyze the objective legal merits of this trademark/copyright issue led them to accept Nintendo's arguments. Yet Nintendo now concedes, by silence, Universal's showing that there was substantial authority to support its position that the movie copyrights did not preclude existence of a separate trademark. *See* Universal Petition 6 n.3.

Here, an objective standard would absolutely preclude sanctions. As Universal has shown without contradiction by Nintendo: (a) the lower courts made no analysis of the legal merit of Universal's positions; (b) there was no holding that those positions were frivolous; (c) there was extensive legal authority *for* Universal's position; (d) this authority included rulings of the District Court in this very case; and (e) this authority included the prior Cooper Judgment, which awarded Universal's predecessor "*all* rights *in and to*" King Kong. Universal Petition 5-9, 20-21.[2]

It thus remains true that if Universal can be sanctioned here, for doing no more than asserting that "all rights in and to" a character include trademark rights in that character—and where the record is absolutely devoid of discovery abuse or any other post-complaint misconduct—a radical expansion of "sanctions" litigation is all but inevitable. This Court can prevent that wholly unacceptable prospect—without a "full review" of the particular facts of this case, as Nintendo claims—by making clear to the lower courts that, before

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2 Nintendo quotes with approval the Second Circuit's construction of the Cooper Judgment as meaning that "Cooper did not hold any trademark rights against the world in King Kong. Any such rights that might exist would be solely against RKO." Nintendo Br. 7, quoting A5. But this construction runs afoul of elementary principles of trademark, under which *any* trademark rights would be rights to exclude "the world", *i.e.*, to prevent consumer confusion as to source—not mere contract rights against RKO. *E.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 259 (1916). *See also* the definition of "trade-mark" itself in Section 45 of the Lanham Act, 15 U.S.C. § 1127.

This construction also ignores the plain language of the Judgment, which awarded Major Cooper all rights "*in and to*" the King Kong name and character themselves, not contract rights against RKO. A117. Nintendo simply cannot explain away the Second Circuit's failure to give effect to this specific, core provision of the Judgment.

Nintendo distorts the record in its attempt to excuse the Second Circuit's failure. It states that the Cooper Judgment was entered "concurrently" with another judgment establishing that "King Kong could not be a trademark." Nintendo Br. 6. In fact the Cooper Judgment was finally entered in 1981, long *after* the other judgment had been *vacated*, A116; and the other judgment did *not* determine that "King Kong could not be a trademark." *See* Universal Petition 8-9; A159.

sanctions can be imposed for taking a legal position, there must be an objective determination that the position lacks legal merit—such as was made in *Noxell Corp.* v. *Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521 (D.C. Cir.), *rehearing en banc denied*, 774 F.2d 1180 (1985).[3]

Second: Nintendo's contentions that grounds alternative to the Lanham Act permit affirmance of the fee award are spurious. Neither Rule 11 of the Federal Rules of Civil Procedure, nor New York law of punitive damages—the two "alternative grounds" asserted by Nintendo—would permit affirmance of the Lanham Act fee award.

As Universal noted in its petition, the version of Rule 11 here involved is Rule 11 prior to the 1983 amendments. Universal Petition 14-15 n.14. The Second Circuit's own prior decisions make clear that the pre-1983 version of Rule 11 addressed *only* improper conduct by the attorney who signed the complaint. *E.g.*, *Eastway Construction Corp.* v. *City of New York*, 762 F.2d 243, 253 (2d Cir. 1985); *Nemeroff* v. *Abelson*, 620 F.2d 339, 350 (2d Cir. 1980). It did *not* authorize sanctions against a litigant. *See*, *e.g.*, *Tedeschi* v. *Smith Barney, Harris Upham & Co.*, 579 F. Supp. 657, 661 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied*, 106 S. Ct. 147 (1985); *United States* v. *Standard Oil of California*, 603 F.2d 100, 103 n.2 (9th Cir. 1979). Here, there was absolutely no finding that Universal's trial counsel acted improperly; to the precise contrary, the District Court repeatedly praised the highly professional conduct of trial counsel. *E.g.*, A19, A66.

Moreover, implicit in Nintendo's Rule 11 argument is the necessary proposition that Rule 11, in its pre-1983 form, could

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3 Nintendo's "distinctions" of *Noxell* (Br. 10-12) completely miss Universal's point. Universal cited, and relies on, *Noxell* because of the careful analysis of a legal position which the D.C. Circuit undertook before imposing sanctions for its assertion. Universal submits that *Noxell* correctly recognized a court's responsibility *not* to impose sanctions for taking a legal position *without* such a careful analysis.

authorize sanctions against a lawyer for asserting a legal position which was *not* frivolous or unfounded. Nintendo cites no authority for this proposition.[4]

Nintendo's other "alternative ground" argument is equally unavailing. Nintendo asserts that New York punitive damage law would permit an award of $1.1 million in attorney's fees for Universal's assertion of trademark rights. But Nintendo has yet to cite a single New York case holding that the filing of a civil lawsuit could constitute "criminal indifference to civil obligations," as New York requires before imposing punitive damages. *Walker* v. *Sheldon*, 10 N.Y.2d 401, 405, 223 N.Y.S.2d 488, 491 (1961). Given New York's "strong public policy of open access to the courts for all parties," *Curiano* v. *Suozzi*, 63 N.Y.2d 113, 118-19, 480 N.Y.S.2d 466, 470 (1984), it is clear that there could be no such authority.[5]

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4 The Second Circuit's failure to base an award on Rule 11 presumably also reflected that the pre-1983 Rule did not even mention attorney's fees. Under the Second Circuit's own precedents, it is unclear that pre-1983 Rule 11 permitted *any* fee award, much less the huge award involved here. *E.g.*, *Nemeroff* v. *Abelson*, *supra*, 620 F.2d at 350.

5 Moreover, as Universal showed in its petition—and as Nintendo concedes by silence—the Second Circuit's punitive damage discussion here was based on a legal proposition which the District Court had squarely rejected—that the public domain status of the King Kong novel precludes a King Kong trademark. A13; compare the District Court's rulings, A29, A42 n.6; *see* Universal Petition 6-7, 17-18. It is nothing short of preposterous for Nintendo to argue as an "alternative ground" that an additional $1.1 *million* in punitive damages can be awarded against Universal for taking a legal position with which the District Court *agreed*.

Nintendo's attempt to justify punitive damages also founders on the fact that the only conduct of Universal which was held to be tortious—other than filing suit against Nintendo—was its sending "lawyer's letters" to certain of Nintendo's "Donkey Kong" licensees. These letters (which were identical) described Universal's claims against Nintendo and warned of similar litigation against the licensees. A sample letter is reproduced at p. A190 of the appendix to this brief. It is solely Universal's delivery of these letters which underlies Nintendo's charges that Universal committed an "assault on Nintendo's licensees," Br. 4, and that "Universal systematically pursued Nintendo's licensees," *id.* 17. Such overheated rhetoric does not begin to justify an award of punitive damages.

Third: Nintendo's discussion of the "reasonableness" issue—its attempt to excuse the lower courts' complete failure to find the fee award reasonable in amount—tries to defend the indefensible. There can be no justification for the lower courts' utter silence on this issue—although faced with what appears to be the largest fee award of its kind ever made. Nintendo does not even mention this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). *Hensley* requires that a party seeking court-awarded fees must affirmatively prove hours worked, hourly rates, and information sufficient to determine if "billing judgment" was exercised. None of this happened here. See also *City of Riverside* v. *Rivera*, ____ U.S. ____, 106 S. Ct. 2686 (1986); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, ____ U.S. ____, 106 S. Ct. 3088, *restored to argument docket*, 106 S. Ct. 3331 (1986).[6]

Fourth: Nintendo attacks Universal's demonstration that the Second Circuit failed to comply with the requirements of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), in determining applicable New York law. (New York law of tortious interference with contract and punitive damages is the only purported basis for $316,717.69 of the award against Universal.) See Universal Petition 17-18, 24-26. Nintendo asserts that the most recent ruling of New York's highest state court, *Curiano* v. *Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466 (1984)—unmentioned by the Second Circuit—is "inapposite" (or even "totally" inapposite) to this case. Nintendo Br. 17. Nintendo contends that its "distinctions" of *Curiano* somehow justify the Second Circuit's complete disregard of that apparently controlling decision. Nintendo Br. 17-18. Quite apart from the

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6 Petitioner notes that this Court recently granted certiorari in another case which discusses the "reasonable fee" requirement of the Lanham Act. *International Olympic Committee* v. *San Francisco Arts & Athletics*, 781 F.2d 733, 739, *amended on other grounds*, 789 F.2d 1319 (9th Cir.), *cert. granted sub nom. San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 55 U.S.L.W. 3277 (Oct. 20, 1986). It appears from the questions presented in that petition, however, that the fee issue is not its focus.

lack of merit to Nintendo's proposed distinctions, spelled out in the footnote, Nintendo once again completely misses Universal's point.

Under *Erie* and its progeny, the issue is not why *Nintendo* thinks an apparently controlling state court decision is "inapposite"; the issue is why the *Second Circuit* thinks so—if this is indeed what it thinks. Nintendo has no basis for saying why the *Second Circuit* regarded *Curiano* as other than controlling. Universal—which has to pay the $300,000-plus in "state law" damages—likewise has no idea why, and absolutely no assurance that there is *any* basis for the award, other than Nintendo's choice to plead state-law claims in a federal court.

This result cannot be squared with *Erie*. *Curiano* is, indisputably, (a) the most recent ruling (b) of the state's highest court, (c) on the precise issue of when "wrongful litigation" is actionable under applicable state law, and (d) therefore of when *any* compensatory or punitive damages for that conduct can be recovered, much less more than $300,000 worth. *Erie* would become the next thing to a dead letter if this Court allowed the lower courts simply not to discuss, or even cite, such strong state law authority where state law provides the rule of decision.

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7 *Curiano*, which is reproduced in full in the appendix to this brief, squarely rejected a claim for "intentional infliction of economic harm by commencement of a lawsuit without legal excuse or justification." A193. It squarely held that, unless malicious prosecution could be alleged—and Nintendo never even claimed that that tort lies here—allowing such an action violates New York's "strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit." A196.

Nintendo claims that *Curiano* is "totally inapposite" because Nintendo pleaded that Universal's litigation constituted "tortious interference with contract," not "intentional infliction of economic harm." Br. 17. But this linguistic difference is legally irrelevant; under New York law, "the plaintiff's right to maintain an action does not hinge on the label used." *Board of Education* v. *Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 406, 380 N.Y.S.2d 635, 644 (1975). Nor does the earlier *Guard-Life* case cited by Nintendo (Br. 18) hold that non-frivolous litigation can be the "wrongful means" required for tortious interference. *No* New York case so holds. *Only* the federal court decisions below do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: November 14, 1986

Respectfully submitted,

MICHAEL W. SCHWARTZ*
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200

Counsel for Petitioner
Universal City Studios, Inc.

Of Counsel:

LAURENCE H. TRIBE
1525 Massachusetts Avenue
Griswold Hall, 307
Cambridge, Massachusetts 02138
(617) 495-1767

J. THOMAS MCCARTHY
University of San Francisco
Law School
2130 Fulton Street
San Francisco, California 94117
(415) 666-6517

*Counsel of Record

APPENDIX

APPENDIX

January 3, 1983

REGISTERED MAIL

Super Shirts Inc.
15235 N.E. 95th Street
Redmond, WA 93052

Re: *Donkey Kong*

Gentlemen:

We are attorneys for Universal City Studios, Inc., owner of the trademark and trade name rights in the name "King Kong," the gorilla character "King Kong" and certain pictorial and graphic depictions of the character "King Kong" made famous by several motion pictures.

As a result of pretrial discovery taken in a lawsuit which our client commenced against Nintendo of America, Inc. and Nintendo Co. Ltd. in the federal court in the Southern District of New York in June of last year, it has come to our client's attention that you are distributing and selling certain products bearing the name "Donkey Kong," apparently pursuant to a licensing arrangement with these defendants.

The claims made by our client Universal in this lawsuit are for common law trademark infringement, violations of § 43(a) of Lanham Act, misappropriation of Universal's rights in the "King Kong" name, character and story, and unfair competition.

We write you at this time to put you on notice that our client regards your use of the trademark "Donkey Kong" in conjunction with the products you sell as an infringement of its rights in "King Kong" for the same reason it regards Nintendo's use of "Donkey Kong" as an infringement of its rights. You should

understand as well that our client intends to press its legal rights against you and other Nintendo licensees. Accordingly, we would suggest to you two alternatives:

1. You immediately cease and desist from using "Donkey Kong" as a trademark in conjunction with the products on which you are now using that name; or

2. You secure a license from Universal authorizing you to use the name "King Kong" and variations of that name, including "Donkey Kong." Naturally, Universal would first require that you submit to it for its inspection and evaluation the products you are selling under the "Donkey Kong" name before any such license would issue.

Very truly yours,

DOUGLAS C. FAIRHURST

DCF/ks

[Defendant's Exhibit 23]

[Reprinted at 63 N.Y.2d 113,
480 N.Y.S.2d 466, 469 N.E.2d 1324]

NEW YORK COURT OF APPEALS

ROBERT CURIANO et al.,

Appellants,

—v.—

JOSEPH SUOZZI et al.,

Respondents.

Decided October 11, 1984

Opinion of the Court

SIMONS, J.:

The question presented on this appeal is whether plaintiffs may recover damages from defendants in a cause of action for prima facie tort because defendants instituted a prior defamation action against them which is still pending and which plaintiffs allege is vexatious and without merit.

The suit arises from campaign literature published by a group of government officials, including plaintiffs, of the City of Glen Cove and Nassau County. The literature, which was intended to oppose the reelection of defendant Suozzi's brother as Mayor, alleged that defendant Suozzi, a former Associate Justice of the Appellate Division, Second Department, had engaged in a speculative real estate purchase and profited from decisions made by his brother acting as Mayor while defendant was still sitting on the Bench. As a result of

the accusations, defendant Suozzi, appearing by his own law firm, the other defendant in this action, instituted a libel action denominated *Suozzi* v. *Parente* against several defendants, including the plaintiffs here.

Plaintiffs then brought this suit asserting two causes of action. In the first they alleged that defendants had defamed them in the *Suozzi* v. *Parente* action by accusing them of libeling Suozzi. It was dismissed by Special Term and plaintiffs have not appealed from that determination. In the second cause of action plaintiffs contend that the purpose of the *Suozzi* v. *Parente* action was not to remedy a wrong believed in good faith to have been committed but was brought "for the malicious and intentional purpose of harming defendants therein" and "to punish the plaintiffs for exercising their constitutional right to free speech and to participation in the public election process." Plaintiffs also asserted that institution of the prior action violated a "duty owed plaintiffs to refrain from institution of a baseless legal proceeding" and "was further intended to cause the plaintiffs expense and to burden them with the defense of a protracted legal proceeding", thereby damaging them.

Special Term denied defendants' motion to dismiss the second cause of action. It found an action for prima facie tort sufficiently stated insofar as the complaint alleged "intentional infliction of economic harm by commencement of a lawsuit without legal excuse or justification", citing this court's decision in *Board of Educ.* v. *Farmingdale Classroom Teachers Assn.* (38 NY2d 397). The Appellate Division, characterizing the cause of action as one sounding in abuse of process, reversed and granted defendants' motion to dismiss (102 AD2d 759). The basis of its decision was plaintiffs' failure to allege an improper use of process after it was issued and a wrongful interference with person or property under color of process, both of which it held were necessary to such an action.

There should be an affirmance. Taking plaintiffs' allegations as true, as we must on a motion to dismiss (see *Sanders* v. *Winship*, 57 NY2d 391, 394), the complaint does not state a cause of action for either abuse of process or prima facie tort.

Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*Board of Educ.* v. *Farmingdale Classroom Teachers Assn.*, *supra*, at p. 403). Relevant on this appeal are the first and last of these elements. First, the process used must involve "an unlawful interference with one's person or property" (*Williams* v. *Williams*, 23 NY2d 592, 596). Insofar as the only process issued in the *Suozzi* v. *Parente* action was a summons, the process necessary to obtain jurisdiction and begin the lawsuit, there was no unlawful interference with plaintiffs' persons or property because the institution of a civil action by summons and complaint is not legally considered process capable of being abused (*Hoppenstein* v. *Zemek*, 62 AD2d 979, 980; see *Drago* v. *Buonagurio*, 61 AD2d 282, 285, rev'd on other grounds 46 NY2d 778; *Osinoff* v. *Muchnick*, 53 AD2d 858, 859). Moreover, plaintiffs have not alleged the " 'gist of the action for abuse of process' ", which is " 'the improper use of process after it is issued' " (*Williams* v. *Williams*, *supra*, at p. 596; *Dean* v. *Kochendorfer*, 237 NY 384, 390; *Miller* v. *Stern*, 262 App Div 5, 8). They do not contend that the summons issued by defendants was improperly used after it was issued but only that defendants acted maliciously in bringing the action. A malicious motive alone, however, does not give rise to a cause of action for abuse of process (*Hauser* v. *Bartow*, 273 NY 370, 374).

The claim that the complaint states a cause of action for prima facie tort was ruled on by Special Term but not addressed by the Appellate Division. Plaintiffs' contention is that prima facie tort will lie against the defendants for instituting an allegedly baseless lawsuit.

Some years ago this court recognized the general principle that harm intentionally inflicted is prima facie actionable unless justified (see *Advance Music Corp.* v. *American Tobacco Co.*, 296 NY 79; *American Guild of Musical Artists* v. *Petrillo*, 286 NY 226; *Opera on Tour* v. *Weber*, 285 NY 348, cert den, 314 US 615). That principle has developed into the

specific cause of action of prima facie tort consisting of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful (*Burns Jackson Miller Summit & Spitzer* v. *Lindner*, 59 NY2d 314, 332; *ATI, Inc.* v. *Ruder & Finn*, 42 NY2d 454, 458). While prima facie tort may be pleaded in the alternative with a traditional tort, once a traditional tort is established the cause of action for prima facie tort disappears (*Board of Educ.* v. *Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 406, *supra*).

Plaintiffs' complaint is insufficient to state a cause of action for prima facie tort insofar as it fails to plead special damages (see *Howard* v. *Block*, 90 AD2d 455; *Ginsberg* v. *Ginsberg*, 84 AD2d 573, 574) and that the sole motivation for the *Suozzi* v. *Parente* action was "disinterested malevolence" (see *Burns Jackson Miller Summit & Spitzer* v. *Linder*, 59 NY2d 314, 333, *supra*; *Reinforce, Inc.* v. *Birney*, 308 NY 164, 169; *Beardsley* v. *Kilmer*, 236 NY 80, 90). We need not base our decision upon technical pleading grounds, however, for New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action (see *Drago* v. *Buonagurio*, 46 NY2d 778, rev'g 61 AD2d 282, *supra*; *Howard* v. *Block*, *supra*; *Ginsberg* v. *Ginsberg*, *supra*; *Scully* v. *Genesee Milk Producers' Coop.*, 78 AD2d 982, app dsmd, 52 NY2d 969; *Belsky* v. *Lowenthal*, 62 AD2d 319, aff'd, 47 NY2d 820; *Knapp Engraving Co.* v. *Keystone Photo Engraving Corp.*, 1 AD2d 170).

Plaintiffs instituted the present action in obvious retaliation for defendants' libel suit. As a matter of policy, it would be unwise to allow it to continue for it would constitute a serious misuse of the cause of action for prima facie tort and could lead to inconsistent results, confusion of issues, and a waste of judicial resources. Prima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy. In this action, however, the gravamen of plaintiffs' second cause of action is one sounding in malicious prosecution, the malicious

institution of judicial proceedings without probable cause for doing so which finally ends in failure (see *Burt* v. *Smith*, 181 NY 1, app dsmd, 203 US 129; PJI 3:50). At the very least plaintiffs must await the completion of the *Suozzi* v. *Parente* action and then bring an action for civil malicious prosecution at which time the merits of their arguments can be assessed properly. On the record before us, it appears unlikely that such an action would be successful because plaintiffs have not alleged an interference with their person or property, an element which is required when the underlying action is civil in nature (see *Burt* v. *Smith*, *supra*).

But even assuming an action for malicious prosecution lies after the *Suozzi* v. *Parente* case is completed, plaintiffs should not be allowed to plead prima facie tort in the alternative. It should not "become a 'catch-all' alternative for every cause of action which cannot stand on its legs" (*Belsky* v. *Lowenthal*, 62 AD2d 319, 323, aff'd, 47 NY2d 820, *supra*, quoted in *Burns Jackson Miller Summit & Spitzer* v. *Lindner*, 59 NY2d, at p. 333). By using it, plaintiffs seek to avoid the stringent requirements we have set for traditional torts, such as malicious prosecution, requirements which are necessary to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit. To permit plaintiffs' action to continue under these circumstances would create a situation where litigation could conceivably continue *ad infinitum* with each party claiming that the opponent's previous action was malicious and meritless.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Cooke and Judges Jasen, Jones, Wachtler and Kaye concur; Judge Meyer taking no part.

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order affirmed, with costs.